

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 196.

GORHAM MANUFACTURING COMPANY,

Appellant,

against

JAMES A. WENDELL, individually
and as Comptroller of the State
of New York, and CHARLES D.
NEWTON, individually and as
Attorney General of the State
of New York,

Appellees.

BRIEF IN REPLY TO RULE TO SHOW CAUSE WHY CASE SHOULD NOT BE DISMISSED AS TO JAMES A. WENDELL, INDIVIDUALLY AND AS COMPTROLLER OF THE STATE OF NEW YORK.

This brief is submitted jointly on behalf of the appellant and appellees. In this case a motion for substitution of the State Tax Commission of the State of New York as appellee in place of James

A. Wendell, the Comptroller of the State of New York, deceased, was submitted jointly on behalf of the appellant and appellees, on December 11, 1922.

On January 2, 1923, this Court entered the following order:

"On consideration of the motion to substitute parties appellee, it is ordered that a Rule to Show Cause why the case as to the Comptroller should not be dismissed in view of Irwin v. Webb, decided March 20, 1922, and U. S. v. Butterworth, 169 U. S. 600, shall issue."

It appeared from said motion to substitute that James A. Wendell, the former Comptroller of the State of New York, as such an appellee herein, is dead and that by Laws of the State of New York 1921, Chapters 90 and 443, amending Article 9a of the Tax Law of the State of New York, all the powers and duties in regard to the collection and enforcement of payment of corporation taxes under said Article 9a which had been previously conferred upon the Comptroller of the State of New York were transferred to the State Tax Commission of the State of New York.

The above entitled suit was brought on the 7th day of October, 1919, in the United States District Court for the Southern District of New York by Gorham Manufacturing Company, a corporation organized and existing under the laws of the State of Rhode Island and a citizen of that State, against the Comptroller and the Attorney General of the State of New York, citizens of that State, praying judgment that the corporation tax against the

plaintiff under Article 9a of the said Tax Law amounting to \$13,582.56, with any penalties thereon, be adjudged void and cancelled of record as contrary to the Constitution of the United States, and that the Comptroller and Attorney General of the State of New York be restrained from collecting such tax and penalties thereon. The decree appealed from was entered by the United States District Court for the Southern District of New York on the 12th day of August, 1921, after the trial of the case, dismissing the bill of complaint filed October 17, 1919, as amended on June 23, 1921, upon the merits. From such decree an appeal was allowed to this Court.

The question involved in the action is the constitutionality of Article 9a of the Tax Law of the State of New York, as imposing a tax to be computed upon an allocated part of the net income of foreign corporations, and the constitutionality of such tax assessed thereunder.

The parties hereto, through their counsel, made a stipulation, annexed to the motion to substitute, subject to the approval of the Court, to the effect that the Comptroller of the State having died and all the powers and duties of such Comptroller in relation to the taxation of corporations under Article 9a of the Tax Law of the State of New York having been transferred to the State Tax Commission by Laws of New York, 1921, Chapters 90 and 443, the State Tax Commission be substituted as defendant-appellee herein in the place and stead of the said Comptroller, and that the Attorney General of the State of New York appears herein for the State Tax Commission, and that all pleadings and proceedings herein stand with the same

force and effect as if the State Tax Commission had been originally a party hereto.

It is respectfully submitted that under the law of the State of New York the substitution of State officers in the place of their predecessors is justified and in accordance with the law and practice of the Courts of the State of New York. The law is well settled by the Court of Appeals of the State of New York that a mandamus proceeding against an officer is not a personal suit and does not abate upon the expiration of the term of such officer, but should be continued in the name of his successor in office. See

People ex rel. Broderick v. Morton, 156 N. Y. 136,

where it was said, at page 148:

"But there is no apparent reason why the provisions of the Code controlling actions and special proceedings against county, town and municipal officers, should not apply as well to state officers. The practice therein provided for is simple and affords ample protection to all parties. Section 1930 provides: 'In such an action or special proceeding, the court must, in a proper case, substitute a successor in office, in place of a person made a party in his official capacity, who has died or ceased to hold office; but such a successor shall not be substituted as a defendant, without his consent, unless at least fourteen days' notice of the application for the substitution has been personally served upon him.' As we have seen, no substitution has been made in this case."

See also

People ex rel. Walker v. Ahearn, 200 N.Y. 146.

People ex rel. Collins v. Ahearn, 137 N.Y. App. Div. 260.

Attention is further called to the case of *Matter of Long Sault Development Company*, 212 N.Y. 1, which was a mandamus proceeding against John J. Kennedy as treasurer of the State of New York. This case was taken to the United States Supreme Court and is there reported in 242 U.S. 272, under the name of *Long Sault Development Company, plaintiff-in-error, against Homer D. Call (as successor of John J. Kennedy), as Treasurer of the State of New York, defendant-in-error*. The printed transcript of record in this Court in that case shows, at page 62, that the judgment of the New York Supreme Court on the amended remittitur of the Court of Appeals recited "that Homer D. Call, having succeeded said John J. Kennedy as Treasurer of the State of New York, now, on motion of Thomas Carmody, Attorney General, for Homer D. Call as State Treasurer, it is * * * adjudged that said Homer D. Call as Treasurer of the State of New York recover" (the costs).

It thus appears that there was a substitution in that mandamus proceeding, recognized by the Supreme Court of the United States, in the title of the case, of the successor to the former State Treasurer against whom such mandamus proceeding was instituted.

In *Saranac Land & Timber Co. v. Roberts*, 177 U.S. 318, the case was disposed of on the merits

in this Court after the expiration on December 31, 1898, of the term of office of James A. Roberts as Comptroller, the defendant-in-error, without the substitution of his successor.

See also *People ex rel. Lardner v. Carson*, 78 Hun 544 (N. Y. Supreme Court, General Term), holding that the duty prescribed by Section 1948 of the New York Code of Civil Procedure, in relation to actions by the People of the State of New York, is an official one pertaining to the office of the Attorney General and not to the person who at any time happens to be the incumbent of the office, and no substitution is necessary.

It should be noted that the case at bar is an equity suit to restrain the State officers from collecting such tax and enforcing the penalties for non-payment thereof; such penalty includes an action to annul the grant of the right to do business in the State. The provisions of the law make it the duty of the State Tax Commission to collect the tax and enforce the penalties for non-payment thereof. Both the State Tax Commission and the Attorney General of the State of New York, who took office on January 1, 1923, have declared their intention to enforce the collection of the tax here in question, and the penalties thereon, in a consent to substitution herein, set forth as follows:

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OF THE UNITED STATES

No. 196. OCTOBER TERM, 1922.

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Appellant,
against
JAMES A. WENDELL, individually
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of New York, and CHARLES D.
NEWTON, individually and as
Attorney-General of the State
of New York,
Appellees.

CONSENT TO SUBSTITUTION.

The undersigned, the Tax Commission of the State of New York, and Carl Sherman, individually and as Attorney-General of the State of New York, hereby consent to be substituted as defendants-appellees in the above entitled action in the place and stead of their predecessors, respectively, the former Comptroller of the State of New York, James A. Wendell, and the former Attorney-General of the State of New York, Charles D. Newton, named as defendants above, and we certify that we intend to enforce against the appellant the tax which is the subject matter of this action in the same way and to the

same extent under the Statutes of the State of New York as did the former officers whose places we have taken by operation of law.

Dated, January 13, 1923.

CARL SHERMAN,
Individually and as Attorney-General of the State of New York.

(Seal of Attorney-General of the State of New York.)

STATE TAX COMMISSION OF THE STATE OF NEW YORK,
By: Walter W. Law, Jr.,
John J. Merrill,
State Tax Commissioners.

(Seal of the Tax Department of the State of New York.)"

On October 1, 1921, the new Civil Practice Act of New York, with its reformed and simplified procedure, took effect. Reference is made to the following quoted provisions of such Civil Practice Act as indicating a broad policy for the joining of all parties to any controversy who are necessary or proper for a determination thereof at any stage of the cause and as the ends of justice may require:

"Sec. 192. *Nonjoinder and misjoinder.* No action or special proceeding shall be defeated by the nonjoinder or misjoinder of parties. New parties may be added or substituted and parties misjoined may be dropped by order of the court at any stage of the cause as the ends of justice may require.

"Sec. 193. *Determination of rights of parties before the court.* The court may determine the controversy as between the parties before it where it can do so without prejudice to the rights of others or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties the court must direct them to be brought in. And where one of the parties to an action claims that a person not a party thereto is or will be liable wholly or in part, for the claim made against him in the action, the court on application of such party must direct such person to be brought in and direct the service upon such person of the pleading, alleging the claim against him. Where a person not a party to the action has an interest in the subject thereof, or in real property the title to which may, in any manner be affected, by the judgment, or in real property for injury to which the complaint demands relief, makes application to the court to be made a party, it must direct him to be brought in by the proper amendment. The controversy between the defendants shall not delay a judgment to which the plaintiff is entitled, unless the court otherwise directs.

"Sec. 211. *Joinder of defendants generally.* All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative; and judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities."

"Sec. 212. Defendant need not be interested in all the relief claimed. It shall not be necessary that each defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him; but the court may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest.

"Sec. 213. Where doubt exists as to who is liable. Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between the parties."

It is the opinion of the Attorney General of the State of New York, counsel for the appellees, and of counsel for the appellant, that under the law and practice of the Courts of the State of New York, a State officer may properly be substituted for his predecessor at any stage of the proceedings, and that the Courts of the State of New York would so order at any time on the request of the parties to the action or the successor to such State officer.

The Court below, in the case at bar, gave practical effect to the law of the New York Courts, under which successors to officers are substituted as parties defendant, by substituting James A. Wendell, the Comptroller named in the present title of this action, for his predecessor, Eugene M. Travis, against whom this action was originally brought (Transcript of Record, pp. 1 and 42, 43).

It is, therefore, asked that the motion for substitution of the State Tax Commission, in the place of James A. Wendell, who was Comptroller of the State of New York at the time of his death, be granted.

Dated, January 17, 1923.

Respectfully submitted,

GEORGE CARLTON COMSTOCK,
ROBERT C. BEATTY,
Counsel for Gorham Manufacturing Company, Appellant.

CARL SHERMAN,
Attorney General of the State
of New York,

C. T. DAWES,
Deputy Attorney General of
the State of New York,
Counsel for Appellees.